

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THOMAS TURNER, an individual,)
on behalf)
of himself and others similarly) Civil Action
situated,)
) No. 20-11530-FDS
Plaintiffs)

vs.)

LIBERTY MUTUAL RETIREMENT
BENEFIT PLAN; LIBERTY MUTUAL
MEDICAL PLAN; LIBERTY MUTUAL
RETIREMENT BENEFIT PLAN
RETIREMENT BOARD; LIBERTY
MUTUAL GROUP INC., a
Massachusetts
Company; LIBERTY MUTUAL
INSURANCE COMPANY, a
Massachusetts
Company; and, DOES 1-50,
Inclusive,
Defendants

BEFORE: CHIEF JUDGE F. DENNIS SAYLOR, IV

MOTION HEARING

CONDUCTED BY ZOOM

John Joseph Moakley United States Courthouse
1 Courthouse Way
Boston, MA 02210

December 15, 2020
11:00 a.m.

Valerie A. O'Hara, FCRR, RPR
Official Court Reporter
John Joseph Moakley United States Courthouse
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1 APPEARANCES:

2 For The Plaintiffs:

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4 225 Broadway, 19th Floor, San Diego, California 92101;

5 Winters & Associates, JACK B. WINTERS, JR., ESQ.,
6 8489 La Mesa Boulevard, La Mesa, California 91942;

7 Chang Law Group LLC, JEFF C. CHANG, ESQ.,
8 One Marina Park Drive, Suite 1410, Boston, Massachusetts
9 02210;

10 For the Defendants:

11 McDermott Will & Emery LLP, by SHAMIS N. BECKLEY, ESQ.,
12 200 Clarendon Street, Boston, Massachusetts 02116-5021;

13 McDermott Will & Emery LLP, by MARGARET H. WARNER,
14 ATTORNEY, 500 North Capitol Street NW, Washington, D.C. 20001;

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10:41AM 20

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1 PROCEEDINGS

2 THE CLERK: Court is now in session in the matter
3 of Turner vs. Liberty Mutual Retirement Benefit Plan,
4 Civil Action Number 20-11530.

5 Participants are reminded that photographing,
6 recording and rebroadcasting of this hearing is prohibited
7 and may result in sanctions.

8 Would counsel please identify themselves for the
9 record, beginning with plaintiff's counsel.

11:01AM 10 MR. TOMASEVIC: Good morning, everyone,
11 Alex Tomasevic for plaintiff.

12 MR. WINTERS: Good morning, your Honor,
13 Jack Winters for plaintiff.

14 MR. CHANG: Good morning, your Honor, Jeff Chang
15 for plaintiff.

16 THE COURT: Good morning. All right, for
17 defendant.

18 MS. BECKLEY: Good morning, your Honor,
19 Shamis Beckley for defendant.

11:02AM 20 THE COURT: Good morning.

21 MS. BECKLEY: We seem to be missing somebody from
22 our side. Apologies, your Honor.

23 THE CLERK: There's an Attorney Diggs and an
24 Attorney Tishyevich, but they're mooted, and I don't see
25 Mr. Tishyevich's video on.

1 MR. TISHYEVICH: I'm sorry, we're missing one of
2 our attorneys.

3 MS. BECKLEY: Attorney Warner is missing,
4 apologies.

5 THE CLERK: Is it possible that Attorney Warner is
6 using a device called WDC-09-New York?

7 MS. BECKLEY: It may be possible. We're just
8 e-mailing her and calling her right now to see. Apologies.

9 THE CLERK: We have someone in the waiting room
11:03AM 10 with that I.D., we just haven't admitted them because
11 they're not identified or registered otherwise.

12 MS. BECKLEY: Understood, yes.

13 THE CLERK: Just let me know.

14 MS. BECKLEY: Thank you. Ms. Warner is on a
15 New York conference attorney number, so she just needs to be
16 let in.

17 THE CLERK: Okay. I'm doing that now, and we will
18 rename her as soon as she joins.

19 THE COURT: My children, when they were teenagers,
11:04AM 20 they would prank me and my wife all the time, you know, sign
21 in a meeting as Bugs Bunny or something. I'm glad they
22 weren't around or at home for the Zoom age, I can only
23 imagine what would be happening.

24 MR. TOMASEVIC: I think there were prank Zoom calls
25 before they got the security fixed.

1 THE COURT: Hopefully it wasn't someone's own
2 children.

3 MR. TOMASEVIC: Right.

4 MS. WARNER: Good morning, your Honor, Peg Warner
5 is on, excuse me.

6 THE COURT: All right. Are we ready to get started
7 then?

8 MS. WARNER: Yes, sir.

9 THE COURT: This is a hearing on defendant's motion
11:05AM 10 to dismiss. Ms. Warner, I'm inferring that you're taking
11 the lead here?

12 MS. WARNER: I am, your Honor.

13 THE COURT: Okay.

14 MS. WARNER: Excuse me, I'm trying to deal
15 with -- I made the mistake of coming into the office.

16 May it please the Court, Peg Warner for Liberty
17 Mutual. Your Honor, this case is about a retiree health
18 plan. The plaintiff is covered under this plan. He will
19 receive benefits. He will receive healthcare benefits under
11:06AM 20 this plan. He seeks to put at issue in this case the amount
21 of the cost sharing under the plan. The plaintiff's
22 conclusory allegations in the complaint go to issues about
23 whether he pleads a cognizable claim under ERISA.

24 These issues relate to, first, what was the
25 healthcare benefit regarding cost sharing when he retired in

1 2019?

2 Second, was the retiree healthcare benefit vested,
3 as he alleges in the complaint in a conclusory fashion?

4 And, third, did Liberty Mutual violate procedures
5 for administering an ERISA welfare plan, which is what is at
6 issue here, a welfare plan?

7 The answers to these questions are clear as a
8 matter of established law, and they are clear from the
9 unambiguous language relating to this cost sharing provision
10 in the plan documents.

11 The plaintiff does not have a cognizable case.
12 This cannot be disputed under the law and under the
13 unambiguous contracts that are the plan documents.

14 Your Honor, there are four unambiguous sections of
15 the operative 2019 plan. Those four sections are the
16 sections to which the Court should refer respectfully when
17 looking at the issues that are pleaded in the complaint:

18 Section 1.4, interpretation on page 2; Section 4.1,
19 benefits on page 4; Section 6.6, right to amend on page 10;
20 and Section 6.2, right to terminate on page 11.

21 Each of these unambiguous provisions in the plan
22 demonstrate unequivocally that he cannot raise a cognizable
23 claim.

24 Next, a provision on page B-60, B-60 of the summary
25 plan description, the SPD, which is made a part of the plan

1 documents by the very unambiguous language laid out. That
2 addresses the cost-sharing benefit under the healthcare plan
3 for former Safeco employees, and that notes, "Eligibility
4 for cost sharing is based on your most recent hire date of
5 January 1, 2009 and does not include any employment service
6 with Safeco prior to January 1, 2009, unambiguous provision
7 2019 SPD, which is the operative SPD because he alleges that
8 he retired in 2019.

9 With regard to the established law, your Honor,
11:09AM 10 there are three Supreme Court cases that clearly dispose in
11 our view of this motion to dismiss. Each of these three
12 cases involved healthcare benefits under an ERISA plan:

13 The first is *Curtis Wright*, 115 Supreme Court 1223,
14 1995.

15 Second, *U.S. Airways*, 133 Supreme Court 1537, 2013.

16 Third, *M&G Polymers*, 135 Supreme Court 966, 2015.

17 Each of these cases state what the operative law is
18 under ERISA for welfare plans, healthcare plans, and the
19 right of employers to amend, modify or terminate those plans
11:10AM 20 at any time in any manner.

21 Finally, your Honor, there are four First Circuit
22 cases that state and hold clearly unequivocally that what
23 Liberty Mutual has done here is not only proper but leaves
24 the plaintiff without the ability to plead a cognizable
25 claim under ERISA.

1 Those cases from the First Circuit are the *Edis vs.*
2 *Verizon* case, 417 F.3d 133 from 2005, *Balestracci*, 449 F.3d
3 224, 2006 case, *Livick vs. Gillett*, 524 F.3d 24, 2008, and
4 *Barchock v. CVS*, 886 F.3d 43, 2018.

5 These four cases lay out clearly, unambiguously, in
6 the First Circuit what the standards are for a 12(b)(6)
7 motion in the context of an ERISA litigation, what the
8 plaintiff is required to plead by way of a well-pleaded
9 complaint, the specificity that must be pleaded with regard
11:12AM 10 to an attack on in particular a welfare plan under ERISA.

11 Here, the unambiguous plan language and this
12 mountain of precedence forecloses the plaintiff's conclusory
13 allegations. He has not pleaded a cognizable claim under
14 ERISA. Justice O'Connor laid out in 1995 in the
15 *Curtis Wright* opinion what is required of an ERISA plaintiff
16 in a welfare plan case. He does not meet this standard,
17 which has been the law of the land subsequently.

18 Your Honor, we have requested dismissal with
19 prejudice. Our position is that under this mountain of
11:13AM 20 precedent and in light of the unambiguous nature of the 2019
21 plan documents that any amendment would be futile.

22 We respectfully request, therefore, that the
23 complaint be dismissed with prejudice. I would be happy to
24 answer any of the Court's questions.

25 THE COURT: Okay. Who is going to take the lead

1 for the plaintiffs? Is that Mr. Tomasevic?

2 MR. TOMASEVIC: Yes, your Honor, and can everyone
3 hear me okay?

4 THE COURT: Yes.

5 MR. TOMASEVIC: Great, thank you. Before I start
6 with any prepared remarks, does the Court have any questions
7 about what occurred or any of the briefs or should I just
8 launch in to what I prepared today?

9 THE COURT: I had some questions, but let me hear
10 your argument first.

11 MR. TOMASEVIC: Very good, your Honor. You know,
12 your Honor, in a lot of ways, I feel like we're two ships
13 passing in the night. You wouldn't know it from listening
14 to my opponent's remarks, but so much of what was said is
15 disputed that this case wouldn't be appropriate for summary
16 judgment, let alone on a motion to dismiss that looks purely
17 within the four corners of the pleadings.

18 To summarize, our case is pretty clear and laid out
19 pretty simple and laid out pretty clearly in the complaint.
11:14AM 20 Mr. Turner, along with many others, were promised by
21 Liberty, including through original plan documents, that
22 workers would get full credit for their Safeco years. They
23 were told they would be grandfathered in.

24 That's in paragraph 39 of the complaint, that as
25 far as this hire date, they were repeatedly told in writing

1 that their hire date was their earlier date with Safeco, not
2 the 2008 date with Liberty Mutual.

3 In other words, Mr. Turner's hire date was 38 years
4 ago, more than 38 years ago, and then, and this is
5 undisputed, Liberty refused to give any such credit. We're
6 not fighting over whether such credit was given. Liberty
7 doesn't deny that it's not going to give the credit.

8 Liberty refused to give any such credit, even going
9 so far as to try to issue new plan documents and revised
10 plan documents after and because Mr. Turner tried to claim
11 his past service with Safeco.

12 Now, these facts give rise to liability under what
13 I like to think of is two halves of the ERISA private right
14 of action. That's a (a) (1) (b), which is basically a claim
15 to enforce the promises in the written plan documents or to
16 interpret those promises, and then secondly under 83, which
17 is more of a catch-all and more of a general provision
18 allowing the Court to draw on its equitable powers to grant
19 any equitable relief for breaches of ERISA, including
20 breaches of fiduciary duty.

21 Now, when I said that we are two ships passing in
22 the night, it's because nearly every remark made by my
23 opponent presumed that the 2019 plan is the only relevant
24 plan here.

25 Well, first, as a matter -- a very important

1 threshold question is I don't even know what they're talking
2 about when they refer to the 2019 plan. They attached
3 extrinsic evidence to their motion to dismiss, something
4 that, of course, we object to, and I'm not going to go into
5 that unless the Court has questions about that, but they
6 attach two documents, a 2013 plan, that's a medical plan
7 document, and then they attached a 2019 SPD, summary plan
8 description, incomplete summary plan description.

9 These are the 2019 documents that they drafted only
10 after and as a result of Mr. Turner speaking up and pointing
11 out that he was not getting his benefits.

12 We've never seen the actual written plan from 2008
13 or anything from 2009 to 2013, and there's no plan submitted
14 that -- no document called a plan after 2013. In fact, in
15 their reply, they admit there's another plan dated 2017 that
16 we also don't have in front of us.

17 Now, let me talk about the SPDs. The SPDs come
18 from 2019, I told you sort of ex post facto after my client
19 and only after my client objected, but they don't include
20 the SPDs from 2008 or 2009 or even what may be the current
21 SPDs from 2020. We don't have those. What we have is this
22 cherry-picked version taken out of context of a couple of
23 documents, which we don't even admit are authentic or
24 genuine, frankly, let alone relevant or important, and
25 that's important for something very important that my

1 opponent said.

2 She said essentially that this is a contract issue.
3 Well, we all know from contracts class and enumerable cases
4 litigating contracts, the first thing you do when you
5 litigate a contracts case is you have to identify what the
6 contract is, and then you have to look at the entire
7 contract, the whole of it and its parts to objectively
8 determine the parties' intent, you don't cherry-pick little
9 pieces here and there.

11:18AM 10 We can't get past the first part here in this
11 admittedly contract interpretation type of case, at least
12 under (a) (1) (b) and Claim 1, when we don't even have the
13 documents, and, in fact, Liberty refuses to produce the
14 documents that are necessary for this contract analysis.

15 So, your Honor, we are worlds apart, and we
16 completely disagree that it is clear that there's
17 unambiguous, unchallenged evidence showing what Liberty
18 thinks is shown here.

19 Now, let me talk about another point that my
11:18AM 20 opponent made, which is that it's clear under *Curtis Wright*
21 and other cases, including in the First Circuit that welfare
22 benefits are a little different than pension benefits, and
23 for the importance of this case that welfare benefits can be
24 taken away.

25 Well, we don't dispute that under some

1 circumstances, welfare benefits can be taken away. I don't
2 know why Liberty Mutual spent so much time talking about
3 this when it's undisputed, but as the *Balestracci* case, a
4 case that both sides cite repeatedly in all of their briefs,
5 makes pretty clear, an employer can contractually cede its
6 freedom to amend and terminate the plan and may provide
7 retirees with vested retiree welfare benefits that cannot be
8 changed unilaterally. That comes straight from the
9 *Balestracci* case at page 230 of the First Circuit's opinion.

11:19AM 10 There, they were citing the *Inter-Modal Rail*
11 *Employees* case that, again, I think both sides have cited
12 for you, the Supreme Court case, 520 U.S. 510, and that's
13 exactly what we say happened here, and we allege
14 specifically that Mr. Turner was essentially promised, it
15 was made part of his employment agreement in essence, and it
16 was promised to him not only in those, in that capacity, but
17 also in other written and oral manners that he would be
18 vested in these retirement benefits, that they were not
19 forfeitable and that he, like everyone else at Liberty
11:20AM 20 Mutual, would be treated the same and would get all of their
21 past service credits for all of the years at Liberty Mutual
22 and that at prior companies, companies that were acquired by
23 Liberty Mutual.

24 Again, we explicitly allege that those were
25 promised, nonforfeitable vested benefits, and when you

1 realize that important and crucial distinction, it
2 doesn't -- *Curtis Wright* and its progeny and all those other
3 cases don't matter anymore because we are taking them out of
4 the normal distinction that exists between welfare benefits
5 and pension benefits.

6 So, your Honor, I think the case is frankly quite
7 simple. We've alleged promises that were not kept. The
8 only way that Liberty Mutual has attempted to attack them is
9 to say not necessarily that they didn't make those promises,
10 although they do say that, but here are some brand new
11 documents cherry-picked from a whole library of documents
12 consisting that cover hundreds of thousands of employees at
13 one of America's largest companies, a cherry-picked select
14 set of paragraphs rather than the whole gamut of promises
15 that are needed to actually decide the decision that you're
16 going to need to decide this very important decision
17 probably on some motion for summary judgment down the line.

18 It's inappropriate to consider those documents.
19 Liberty's arguments in that regard must be rejected, and we
20 ask that you deny the motion outright and allow us to
21 finally do the discovery and make Liberty actually produce
22 the real documents that their arguments truly rely on. With
23 that, unless you have any questions, your Honor.

24 THE COURT: Let me ask you this, so if I understand
25 what you're saying is the plaintiff here has vested rights

1 or perhaps equitable rights based on sort of one of or maybe
2 all but three different categories. One is some one or more
3 earlier plans. That would be Category 1. Category 2 would
4 be some other written documents, such as an employment
5 agreement. And Category 3 would be an oral representation.

6 Am I correct, did I read it correctly that you
7 don't have copies of the written documents on which
8 plaintiff relies? In other words, he says he has vested
9 rights, but he doesn't have those documents. Do I have that
10 right?

11:23AM

11 MR. TOMASEVIC: I'll answer your question in two
12 parts. You are correct in your summary that we will
13 introduce evidence of all three things, plan documents, of
14 which there are many other written documents that may not
15 necessarily be plan documents and oral representations, so
16 you're correct there, your Honor.

17 As far as what we have in writing, remember,
18 Liberty Mutual refused to produce the whole library of plan
19 documents, even though it's their obligation to do so, or at
20 least, you know, that's what we allege and lay out in the
21 complaint.

11:23AM

22 What we do have are some older SPDs that now
23 apparently Liberty Mutual will say are not relevant, and
24 those SPDs say specifically that the Safeco people were
25 grandfathered into the program, including their prior years

1 of service.

2 We also have, and we don't want the Court to
3 consider them, but if the Court were even to look at the
4 documents that Liberty attached to its motion, those
5 documents themselves rely on earlier plan documents, and, in
6 particular, Section 6.1 and 6.2 of their purported plan
7 documents says nothing in these new documents is going to
8 change what you were given and what we incurred in the
9 earlier documents, so they're acknowledging these earlier
10 documents but not showing them to us, your Honor.

11 So to answer your question in short, yes, we rely
12 on those three things, but, no, we have some things we were
13 able to gather despite Liberty Mutual's insistence on not
14 letting us see everything.

15 THE COURT: I mean, one of the reasons I'm asking
16 is normally you are the plaintiff, you know, you put forth
17 your affirmative case saying, you know, I relied on this
18 piece of paper, here it is, and I'm not sure I'm seeing
19 that. Maybe I'm missing it.

11:24AM 20 I know you don't have complete copies of everything
21 you need, but it wouldn't surprise me that an employee
22 doesn't have, you know, a complete copy of the plan as
23 opposed to an SPD or something here or there, but it's a
24 difference between a fishing expedition and not a fishing
25 expedition I guess is the point I'm trying to make.

1 You know, if he says no, here it is, it says here
2 in writing I'm vested or this benefit won't be taken away,
3 or we'll give you credit for your Safeco service, he
4 presumably has that, right?

5 MR. TOMASEVIC: Well, your Honor, there's a couple
6 of -- I'm going to answer your question in two parts, and I
7 believe my colleague, Mr. Jack Winters, if you'll allow,
8 will have something to add, so as a matter of pleading,
9 there's no rule that says you have to attach all documents
11:25AM 10 to your complaint, as we all know.

11 Well, we gave to the best of our ability quotes,
12 such as grandfathering in, such as vested, and we describe
13 the representations as well as the written materials that my
14 client was exposed to in the complaint, and, again, that we
15 didn't include exhibits is really I don't think critical
16 here, but I think perhaps more importantly, I didn't want to
17 make the same mistake that Liberty is making here, which is
18 attaching out of context a small selection of what we know
19 is a giant library, a library that, frankly, we should have
11:26AM 20 had already because ERISA requires Liberty to give it to us,
21 so, I mean, if the Court wants to see some paper, some
22 additional paper more than that it's already seen, we can do
23 that to an extent, but the best method or the most efficient
24 use of our time would be, well, let's do that after Liberty
25 Mutual has complied with its obligation under ERISA to

1 provide all the documents.

2 THE COURT: I'll let Mr. Winters hop in in a moment
3 here, but my next question is what is your response to the
4 case law that says it doesn't matter, you know, that there
5 were oral representations, that ERISA doesn't work that way,
6 and a related question to me, anyway, is normally when
7 you're relying on a representation, whether it's a
8 misrepresentation, claim or fraud, or an oral
9 representation, you need to provide particulars, who made
10 the representation, when, you know, what authority did that
11 person say, and it's all pretty vague in the complaint.

12 It wouldn't survive a Rule 9(b) motion, for
13 example, if you were alleging fraud, but should I even
14 consider any of these oral representations, and, if so, why?
15 I mean, even if you're right, let's say, and this earlier
16 plan documents say he's vested or maybe his employment
17 agreement says he's somehow vested, under what circumstances
18 do I consider the oral representation, if so, and why are
19 they not specifically alleged? You know, who?

11:28AM 20 MR. WINTERS: Your Honor, perhaps I can explain in
21 some more detail.

22 THE COURT: All right.

23 MR. WINTERS: The plan documents that you have in
24 front of you are only part of the overall ERISA plan. If
25 you look at the section of the SPD that they provided you at

1 page B-57, Exhibit 1, there is a section entitled, "Cost for
2 Retiree Coverage," and in that section, it references
3 employment of individuals who came with the company before
4 2013 and remained there, and it specifically references the
5 Liberty Mutual retirement benefit plan. That is not what
6 you have in front of you, you only have part of that plan is
7 the health part.

8 THE COURT: But that's all we're talking about,
9 right?

11:29AM 10 MR. WINTERS: No.

11 THE COURT: It's not a pension benefit?

12 MR. WINTERS: No, no, your Honor, the health plan
13 referenced in the SPD utilized representations made in the
14 benefit plan. We do not have in this case, your Honor, copy
15 of the Liberty Mutual retirement benefit plan.

16 We happen to know, your Honor, we are the attorneys
17 who handled the *Moyle vs. Liberty Mutual* prong, and that was
18 a retirement benefit plan, but we have extensive information
19 regarding that plan, and one of the aspects of that plan are
11:29AM 20 vesting provisions we believe will probably apply here as
21 well.

22 That plan, which is referenced in their exhibit,
23 which has not been produced, also contains definitions for
24 all of these terms.

25 Now, we can't use them yet because we're not sure

1 exactly what those plans are. There is nothing that says,
2 your Honor, that a health plan is limited to just one thing,
3 one piece of paper. There's no law to that effect, and we
4 have alleged that everything constitutes part of the plan.

5 With regards to the oral representation prong, your
6 Honor, Mr. Turner had significant, lengthy, hour-long
7 conversations on the phone, all of which were recorded for
8 more than a year before they modified the SPDs. We asked
9 for those recordings, and we haven't gotten them, so we will
10 have evidence of representations. We will be able to answer
11 the Court's questions as to who, what and when was it said,
12 but we don't have that information.

13 Your Honor, this is really a totality of the
14 circumstances case. We do not have in front of you an
15 administrative record yet, and in most cases like this, you
16 have the entire administrative record, you have the entire
17 ERISA plan. There's no integration clause in the materials
18 that they have provided. We get to come in with oral
19 representations that explain ambiguous provisions. We get
20 to come in and put our case on, and we need to be able to
21 articulate these things specifically. We need to see
22 everything, as does the Court, and, your Honor, there is the
23 possibility of retaining the right to modify a plan and
24 completely eliminate the plan, but if they haven't done it
25 the right way, they can't do that, they can only eliminate

1 it completely.

2 This is a unique case because they literally
3 modified the SPD specifically in response to Mr. Turner's
4 complaint. They only modified it as to Safeco employees.
5 There was no reason to do that. They didn't need to modify
6 it, and there was even -- there's even issues, your Honor,
7 concerning his delay in retirement, why he delayed it.

8 There are issues of fact in this case, your Honor,
9 to the extent that their lawyers in response to Mr. Turner
11:32AM 10 before he had presented any litigation threat literally got
11 involved in this, redrafted everything, and then wouldn't
12 tell us what they had done or why they had done it.

13 This is a very complex situation, and we need some
14 discovery to be able to articulate everything, and so there
15 are answers to everything here, your Honor, but as my
16 co-counsel has indicated, they're just cherry-picking. We
17 do not agree for one moment that you have in front of you
18 the entire plan, and we are entitled to see the entire
19 contract, and we are entitled to be able to then present our
11:33AM 20 theories in a fashion which should be done by way of cross
21 motions for summary judgment.

22 Sorry to interrupt so long, Alex.

23 THE COURT: Let me hear Ms. Warner's response to
24 this.

25 MS. WARNER: Excuse me. Your Honor, let me first

1 address the issue of the allegation here that the plan
2 documents are not before the Court. First of all, that's
3 not correct. The 2019 plan at Section 1.4, interpretation
4 page 2 states, "The plan shall consist of the articles and
5 appendices of this plan document, the SPD as may be amended
6 from time to time."

7 There is no doubt from the allegations made in this
8 complaint that the plaintiff had in his possession the 2019
9 plan and the 2019 SPD. Those are the two operative
10 documents because he retired in 2019.

11 Secondly, he attempts to put at issue earlier plan
12 documents, other documents and oral representations. Those
13 are all precluded by the law. They're precluded clearly by
14 the law, and the Supreme Court cases that I've cited state
15 that, oral representations do not suffice. ERISA is all
16 about the written plan.

17 THE COURT: Suppose he says, I think, I'm
18 struggling with this a little bit, but he says he was vested
19 under one of these earlier versions of the plan. Suppose
20 the 2013 plan says you are vested and entitled to all your
21 time, you know, at Safeco. That would matter, wouldn't it,
22 regardless of what the 2019 plan is, like that's something
23 you couldn't take away, right?

24 MS. WARNER: Your Honor, the facts in the 2013
25 plan, which was provided as an exhibit to the reply, show

1 unequivocally and unambiguously that Liberty Mutual reserved
2 the right to modify, amend the plan at any time. That is
3 the law of welfare plans under ERISA.

4 THE COURT: Including, unvesting people who have
5 already vested?

6 MS. WARNER: That's the second point, your Honor.

7 THE COURT: Okay.

8 MS. WARNER: They take for granted that there has
9 been vesting, but, again, that flies in the face of the
11:36AM 10 complete, clear Supreme Court precedent and what they've put
11 at issue here. Welfare benefits do not vest absent some
12 other contractual arrangement. They have not pleaded any
13 other contractual arrangement. They are required to do that
14 under the controlling pleading standards.

15 They haven't done it. Frankly, they cannot do it.
16 They have a promise that these benefits were vested. That
17 is absolutely, absolutely contrary to what *Curtis Wright*
18 requires, *U.S. Airways* requires and the *M&S Palmer* case
19 requires, so there is no vesting of welfare benefits in a
11:37AM 20 situation where clearly at all times the plan and the SPD
21 provided for amendments, provided for changes in the plan's
22 structure, which is completely unallowed under ERISA, and
23 Justice O'Connor addressed the reason for this, the
24 legislative reason for this in the *Curtis Wright* decision.

25 Next, he did not allege that Liberty Mutual failed

1 to provide him with the operative plan documents. He
2 clearly has the 2019 plan. He clearly has the 2019 SPD. He
3 has the two documents that are the operative documents to
4 determine his welfare benefits under the Liberty Mutual 2019
5 health plan.

6 There was no misrepresentation of the benefits
7 here. There was no misrepresentation because there couldn't
8 be a misrepresentation with regard to vesting because
9 vesting never happened under the very language of each of
10 these documents.

11:38AM

11 With regard to the issue that Liberty Mutual failed
12 to provide the operative documents, again, completely runs
13 into the mountain, it flies into the mountain of
14 Supreme Court precedent. *Curtis Wright*, I'm very enamored
15 with *Curtis Wright* because it is the leading case, it is the
16 seminal case on this issue. Justice O'Connor said in
17 *Curtis Wright*, "ERISA requires that every plan administrator
18 make available for inspection a set of all currently
19 operative governing plan documents."

11:39AM

20 Liberty Mutual mailed the currently operative
21 governing plan documents to Mr. Turner. There is no
22 allegation in the complaint otherwise. Mr. Winters has made
23 a number of statements in argument today. None, zero of
24 those are well pleaded in this complaint.

25 They have failed to plead a number of these items.

1 Pleading them would be futile because they would be running
2 into this precedent, running into the unambiguous language
3 of the operative plan documents, but, regardless, your
4 Honor, they haven't pleaded them. If they want to try to
5 make a cognizable claim, I suppose they could try by
6 repleading. It would be futile under the law. It would be
7 a waste of the Court's valuable resources at this time, but
8 they can't just say to you now in this argument things that
9 are not pleaded in this complaint, and they cannot get
11:40AM 10 around these clearly stated established principles under
11 ERISA welfare benefit law.

12 There is no vesting of welfare benefits absent a
13 contractual arrangement. They have not pleaded any such
14 contractual arrangement with Mr. Turner. They cannot get
15 around the 2019 unambiguous plan language. Thank you.

16 THE COURT: The 2019 amendment that made the
17 specific reference to Safeco obviously amended an earlier
18 existing plan. What was the date of the earlier existing
19 plan, was it 2013?

11:41AM 20 MS. WARNER: It was 2013, your Honor, and I want to
21 be very clear on one point that's been stated by plaintiff's
22 counsel. Mr. Turner, and it is alleged in their complaint
23 and it is true, it is not just true for the purposes of this
24 12(b)(6) motion, it is true Mr. Turner retired in 2019. He
25 did not retire prior to that time.

1 THE COURT: All right. Mr. Tomasevic, any response
2 to that?

3 MR. TOMASEVIC: Yes, your Honor, briefly. So the
4 idea that Mr. Turner retired or may have retired in 2019 is
5 completely irrelevant and a red herring. There is no law
6 cited by the defendant, nor any plan language that says that
7 when you retire is the dispositive date upon which we no
8 longer look at any other documents.

9 In fact, that wouldn't make any sense even under
10 their own exhibits and their own documents because, as I
11 pointed out in Section 6.1 and 6.2 of their own exhibit,
12 which is Exhibit 2, it says essentially we're incorporating
13 the prior language, and nothing in this new language is
14 meant to overthrow obligations incurred in the prior
15 language.

16 THE COURT: But you say as of the 2013 plan, he was
17 vested, right?

18 MR. TOMASEVIC: I'm saying he was vested at all
19 times and prompt vesting from 2008 on, your Honor.

11:42AM 20 THE COURT: So up to the moment they amended the
21 plan in 2019, he was vested at the second date they amended
22 the plan?

23 MR. TOMASEVIC: Right, as we allege in the
24 complaint, he was vested, he had an unforfeitable right to
25 those medical benefits, your Honor.

1 THE COURT: That's true under the earlier plan?

2 MR. TOMASEVIC: Under earlier plan documents, and
3 remember, you know, your Honor, I'm still confused as to
4 what this phrase "2019 plan" refers to. Is it the 2017 plan
5 that's referenced in the reply, is it the 2013 plan attached
6 to their initial motion, is it the 2013 plan as modified by
7 the SPDs that they drafted in 2019 only after my client
8 spoke up?

9 I still don't know what document is being referred
11:43AM 10 to as "2019 plan," and as Mr. Winters pointed out, when you
11 talk about ERISA and you talk about a "plan," it's not some
12 neat little 10-page document, especially not at a company of
13 this size that's been in existence so long, we're talking
14 about documents like a medical plan portion that are part
15 of, as we allege in the complaint, an entire retirement
16 benefit plan that has been amended over many years that
17 includes what's called and what we refer to sort of quickly
18 as SPDs, but then if you stop there, SPDs means actually a
19 collection of documents, including correspondence and other
11:44AM 20 things that are not attached to their motion, even if we
21 accept what they attach to their motion.

22 SPDs are supposed to include summaries of material
23 plan modifications, again, also admitted by Liberty in its
24 motion if we're going to even count against the extrinsic
25 evidence, so, Liberty has to prove what the plan is, that

1 question Number 1 we talk about in every contracts case,
2 identifying the contract, and they can't do it with a
3 cherry-picked, taken out of context set of paragraphs from
4 documents that were created after the dispute arose, your
5 Honor, and that's our main thrust here, but, again, when
6 Mr. Turner retired in 2019 is really besides the point, and
7 there's no case and no language in the contract that
8 supports that claim.

9 In fact, their own contract at Section 6.1 and 6.2
11:44AM 10 actually incorporates the older documents, we have to look
11 at the older documents.

12 THE COURT: All right. Let me --

13 MR. TOMASEVIC: There was one other point I wanted
14 to make about oral representation, your Honor. So there's
15 one thing we have to keep crystal clear. Basically there's
16 two theories or two halves to the case. I mean, there are
17 additional claims, but let's talk about (a) (1) (b) and (a) (3)
18 again briefly.

19 (A) (1) (b) is a contract type of analysis. Does the
11:45AM 20 paperwork say what we think it says or what Liberty thinks
21 it says, and to the extent Liberty cites authority that says
22 you can't modify the written plan with oral representations.
23 Well, we dispute that because Mr. Winters pointed out
24 whenever there's ambiguity, you can always bring in parole
25 evidence when there's no integration clause, but even if

1 Liberty was right, and we don't think they are, that still
2 doesn't speak to (a) (3) claim or Count 2, which is more of
3 an equitable, broad, and I call it a catch-all provision
4 that allows again and gives greater weight and consideration
5 to these additional pieces of parole evidence, if you will.

6 And, in fact, if you look at our arguments with
7 respect to the SPD claim, the fourth claim, we there point
8 out what is also important and what is undisputed here is
9 that what you start to look at when you're evaluating SPDs,
10 as Liberty Mutual itself invites, you have to look at the
11 expectation of the parties.

12 In fact, this is what -- this is how Liberty Mutual
13 lost summary judgment in the *Moyle* case in the Ninth Circuit
14 is because we were able to plead and prove that there was a
15 reasonable expectation by the retirees that would get past
16 service credit this time for a company called Golden Eagle.

17 And the Court was very clear, and the Ninth Circuit
18 affirmed that we have to look at the reasonable expectations
19 of the parties, and if the reasonable expectations are such
20 that they expected something, well then you have to disclose
21 anything contrary in plain language and expressly in your
22 SPDs, and it has to be somewhere in your documents.

23 Again, we're missing all of the documents, but,
24 second, we clearly allege that that's not anywhere in any
25 documents, so, again, the oral representations are

1 important, they're not dispositive here, and there is no
2 9(b) requirement that we plead them with any type of
3 specificity, but they are important, and they're especially
4 important for the (a)(3) claim, which we have keep distinct
5 from the (a)(1)(b) claim, your Honor.

6 THE COURT: All right. Let me toss out an idea
7 here, which is this: I would like to eliminate this dispute
8 about whether we're looking at documents outside the record
9 on a 12(b)(6) motion. I think it's pretty clear that the
10 plan documents that are at the center of the dispute can be
11 considered, but I'd like to eliminate that issue.

12 I would like to convert this to a motion for
13 summary judgment and to permit some supplemental affidavits
14 and briefing in order to eliminate that issue. In order to
15 make that a useful exercise, among other things, the thought
16 occurs to me, and I guess I'll put the question first to
17 Ms. Warner, I'm disinclined to permit discovery at this
18 point for what should be obvious reasons, but is there any
19 reason why Liberty could not produce, just so that there's
20 no dispute about this, the current plan and current SPD or I
21 should say the plan and SPD as of January 2019 and whatever
22 the plan and SPD were prior to that amendment in their
23 entirety incorporating prior documents by reference, you
24 know, produce those documents, too, and just so there is no
25 dispute, the plan on the day he retired and the plan before

1 it was amended, which they say was improper.

2 And then, plaintiffs, is there some reason if you
3 have written documents, employment agreements, whatever it
4 is you say you have, oral representations made by somebody,
5 is there some reason you can't put that in the record,
6 whatever you have, and it's either relevant or not, I'll
7 look at the case law. You know, the oral representations, I
8 assume I have my doubts about it, but I'll look at the
9 cases, and then we have what I'll call the core dispute.

11:49AM 10 Ms. Warner.

11 MS. WARNER: Your Honor, yes, Liberty can
12 absolutely provide the operative plan documents. I want to
13 be clear what those are. They are as they are defined in
14 the plan, the plan and the SPDs. We will provide those, and
15 we will provide those with regard to 2019, and we will
16 provide the prior ones, but I want to be abundantly clear
17 here that the plaintiffs have those, for sure, but that's
18 not what they've asked for. They have asked in addition for
19 a number of items that are absolutely not the plan
11:50AM 20 documents.

21 THE COURT: Maybe we get there, maybe not, but for
22 us to even go down that path, I need to see that they have a
23 valid basis for a claim, not a plausible claim, that's why
24 I'm talking about summary judgment here, not just an
25 allegation but, you know, sufficient evidence to convince me

1 at this stage, and, obviously, there may be some Rule 56(d)
2 type responses if they don't have enough information, but I
3 want affidavits, documents, fragments of documents,
4 whatever, sufficient to show, you know, the basis of their
5 claim and so I can evaluate that and decide, ah-huh, is
6 there something here in the case law that would permit this
7 to survive summary judgment or permit me to allow discovery
8 to go forward.

9 I need to be convinced of that, but I also want to
11:51AM 10 eliminate this dispute about what is the plan in 2019 and
11 what was the plan the day before it was amended.

12 MS. WARNER: We will provide the answer to that
13 question, which we have laid out in the motion. We will be
14 abundantly clear about it.

15 THE COURT: If it's 10,000 pages, give them 10,000
16 pages; if they already have it, fine, give it to them again.

17 MS. WARNER: We will. It's not 10,000 pages, but
18 we will give them everything that are the plan documents for
19 those years.

11:51AM 20 THE COURT: Okay. And so, again, my idea here, I
21 convert this to a Rule 56 motion, these documents get
22 produced, supplemental affidavits and briefing are
23 permitted, and plaintiffs lay out what they have, you know,
24 maybe what they don't have, why they need discovery under
25 Rule 56(d) but permitting me to look outside the record at

1 this point and to look at the case law and decide whether or
2 not these claims should survive or at least survive into the
3 discovery stage.

4 Mr. Tomasevic, is there any reason why that
5 wouldn't work?

6 MR. TOMASEVIC: Well, your Honor, your first
7 question to me was is there any reason the plaintiff can't
8 provide more evidence or detail as to what he relied on, to
9 paraphrase, your Honor. The answer to that is no, there's
10 no reason we can't. In fact, we intended to, we just didn't
11 think it was necessary on a motion to dismiss.

12 Now that you're converting that, we're in a
13 different arena, so to speak, and I acknowledge that and
14 this is progress, but I want to be clear that this is only
15 progress to one part of the case, so the plan documents and
16 the written contractual documents are really important to
17 the (a) (1) (b) claim, and you'll be able to probably call
18 balls and strikes on the (a) (1) (b) claim on the first count,
19 but when you start getting into the equitable claim under
20 (a) (3) and especially when you start getting into the
21 reasonable expectations argument that is critical to Count 4
22 of the adequacy of SPDs, we're going to have look well
23 beyond the contractual language, and we start thinking of
24 those oral representations, we start looking at the recorded
25 conversations that Liberty has refused to provide that

1 Mr. Winters talked about, and we're looking at a whole host
2 of other things, marketing materials, other things from 2008
3 that were given to the class when they were asked to make
4 this important decision as to whether to come over from
5 Safeco to Liberty Mutual or go on their own.

6 So you've got from what my colleague, Mr. Winters,
7 said about his phrase, you've got more of a totality of
8 circumstances inquiry with all of the counts except for
9 (a) (1) (b), so to summarize, yes, we're making progress on
10 the (a) (1) (b) claim by looking at claim documents, but
11 you're going to hear from us that we need a lot more if
12 we're going to do summary judgment on the rest of the
13 claims.

14 THE COURT: And I just want you to lay out what you
15 have, okay, so I can evaluate that according to the case
16 law, and it may be an affidavit that says that the executive
17 vice-president stood up at a meeting, you know, on such and
18 such a date and said X, Y, Z, and I don't have any document,
19 and then Ms. Warner can say, well, no, that's an oral
20 representation, that's irrelevant, and you can say, no, it
21 was part of the equitable, reasonable expectation package,
22 and I can evaluate that, and either, you know, I grant
23 summary judgment or I deny it, but I want to look at the
24 facts that you have in hand right now that form the basis of
25 your equitable claim, including things that are in writing,

1 like you say that there's an employment agreement that, you
2 know, affects this, you know, where they made a direct
3 representations to the contrary, let's see it, okay, and
4 let's see how that, you know, the evaluation of that
5 totality of information that is not total in the sense that
6 without discovery, you don't have everything but enough that
7 I can evaluate it and decide, yes, there is sufficient
8 evidence to support a claim for equitable relief that should
9 permit this case to go forward into the discovery stage.

11:55AM 10 Ms. Warner.

11 MS. WARNER: Yes, your Honor, thank you. So we
12 will put forth again to the Court the legal reasons why the
13 equitable relief is not available here due to the lack of
14 vesting, due to therefore the lack of any misrepresentation
15 and due to the other legal factors that we briefed.

16 I just want to state that. I understand what the
17 Court is requesting, and I'm giving you a little bit of a
18 preview of how we will come back at that because we feel
19 very strongly that they can't move to these so-called
11:56AM 20 equitable remedies unless they can demonstrate that the plan
21 was anything other than clear with regard to the benefits
22 that could be modified at any time.

23 THE COURT: Okay. So just to be clear, you know,
24 you may wind up wanting to move to strike some of this
25 stuff. You can just kind of fold that into your summary --

1 I'll leave it to you to brief it how you want. You know, if
2 you think it's irrelevant and the appropriate remedy is
3 motion to strike, that is fine, but that's a collateral
4 technical piece of this dispute I think at this point.

5 MS. WARNER: Understood, your Honor.

6 THE COURT: All right. The timing on all of this,
7 because of the holidays and because of COVID, I am inclined
8 to give you about a month. Is that too much, too little,
9 and then some replies after that, and then we reconvene?

11:56AM 10 MR. WINTERS: When would we be looking at the new
11 materials from Liberty? I mean, one of the things we're
12 looking for is the Liberty Mutual Retirement Benefit Plan
13 that's referenced in the SPD. We know that's extensive, and
14 when are we looking at all of these materials getting to us?

15 THE COURT: Ms. Warner, when do you think you could
16 get this produced?

17 MS. WARNER: I believe I could get this within the
18 week. I will consult with my client, and I will provide an
19 e-mail to the plaintiff's lawyers today in terms of the time
11:57AM 20 frame, but I do not foresee this being a problem.

21 THE COURT: Okay. If it's longer than a week, that
22 is, if you can't do it by December 22nd, let's talk about
23 that, and, you know, maybe I need to extend the schedule or
24 something. Hold on. Let me look at the calendar.

25 All right. So I'm going to direct that -- well,

1 first, I'm going to formally direct that I'm going to
2 convert this motion to a motion for summary judgment. I
3 don't need new briefing from scratch, although I'll leave
4 that to your discretion, just have mercy on me in terms of
5 what you are providing to me that I have to read, so by
6 January 15th, any supplemental briefing or supplemental
7 affidavits and exhibits, replies by -- that is, responses to
8 that we'll say by January 29th, and let's reconvene with a
9 Zoom hearing, how about Friday, February 5th at 2:00 eastern
10 time. Does all that work?

11:58AM

11 MS. WARNER: That works, your Honor.

12 MR. TOMASEVIC: Your Honor, I'm sorry to be the
13 thorn in the side, but I know that I'm going to be without
14 some staff until January 6th, at least, and so things like
15 getting all the documents in our system, uploaded and the
16 volume of the documents is going to be tough to handle
17 before then.

18 THE COURT: I'll tack a week onto everything, so
19 I'll make the simultaneous filings January 22nd, replies by
20 February 5th, and how about Friday 12th at 2:00 for
21 argument?

11:59AM

22 MR. TOMASEVIC: All right, your Honor, and I think
23 in so doing, you answered my second question, which is these
24 are simultaneously traded briefs, both the supplemental and
25 the replies. Okay, great.

1 THE COURT: Yes.

2 MR. TOMASEVIC: My last point, I want to be candid
3 with the Court, so when I made earlier remarks about an
4 employment agreement, it was really -- what I really want to
5 say is I don't know that there's a written employment
6 agreement that says vesting, vesting, vesting.

7 THE COURT: Okay.

12:00PM 10

8 MR. TOMASEVIC: I say that it was effectively part
9 of the agreement and the understanding, which could have
10 meant orally.

11 THE COURT: Mr. Turner has his version of the
12 facts, okay, I want it laid out in an affidavit. You do
13 your job how you think you need to do it, but it seems to me
14 if he says the guy shook my hand and said, don't worry,
15 you're vested, whatever the facts are, I would put that in
16 an affidavit, and then we can evaluate it according to what
17 you say of the case law that permits equitable relief under
18 such circumstances.

12:00PM 20

19 MR. WINTERS: Judge, just so we're clear, we're not
20 going to -- if what they give us is not sufficient in the
21 next week, that's just something we raise in the motion.

22 THE COURT: No, I'd like get it resolved well in
23 advance. In other words, if you think somehow, you know,
24 she's going to give you 2019 in its entirety, the prior plan
25 in its entirety, which I think is 2017, if you think

1 something is missing, meet and confer, you know, and if you
2 have a dispute, bring it to my attention, but let's get that
3 wrapped up. I mean, those documents are what they are.
4 Somewhere in the files of Liberty Mutual, you know, the law
5 department, you know, it's probably electronic now, but they
6 have this, right. And if it's complicated, sometimes it is,
7 you know, meet and confer, and I can resolve any disputes.
8 Okay.

9 MR. WINTERS: Very good, your Honor.

12:01PM 10 MR. TOMASEVIC: Thank you, your Honor.

11 THE COURT: So the motion will remain pending, and
12 this will be the schedule. If there are disputes, requests
13 for clarifications, I would rather nip them in the bud
14 rather than letting them fester for long periods of time. I
15 may not be entirely easy to reach between Christmas and
16 New Year's, but I will do my best, you know, so let's try to
17 hold to the schedule.

18 Okay. Thanks, everyone, and have a safe holiday
19 and a good holiday, not necessarily the same thing, and we
12:01PM 20 will speak again in February unless something comes up.

21 MR. TOMASEVIC: Thank you, your Honor.

22 (Whereupon, the hearing was adjourned at 12:01 p.m.)

23

24

25

1 C E R T I F I C A T E

2

3 UNITED STATES DISTRICT COURT)

4 DISTRICT OF MASSACHUSETTS) ss.

5 CITY OF BOSTON)

6

7 I do hereby certify that the foregoing transcript,
8 Pages 1 through 40 inclusive, was recorded by me
9 stenographically at the time and place aforesaid in Civil
10 Action No. 20-11530-FDS, THOMAS TURNER, an individual on behalf
11 of himself and others similarly situated, vs. LIBERTY MUTUAL
12 RETIREMENT BENEFIT PLAN and thereafter by me reduced to
13 typewriting and is a true and accurate record of the
14 proceedings.

15 Dated December 17, 2020.

16

17 s/s Valerie A. O'Hara

18

19 VALERIE A. O'HARA

20 OFFICIAL COURT REPORTER

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